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No. 85-1743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TEAMSTERS, LOCAL 317,

Petitioner,

—v.—

CLINTON'S DITCH COOPERATIVE CO., INC., and
NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals created a standard for determining joint employer status which conflicts with the decision of another federal Court of Appeals?
2. Whether the Court of Appeals correctly applied the substantial evidence standard in vacating the National Labor Relations Board's decision that Clinton's Ditch Cooperative Co., Inc. was a joint employer of drivers represented by Teamsters Local 317?
3. Whether the question raised by Petitioner regarding the enforceability of an alleged oral agreement between the parties should be considered by this Court?

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

On February 28, 1985 the National Labor Relations Board (the "Board") issued its decision and order in 274 NLRB No. 103. The Board found that Clinton's Ditch Cooperative Co., Inc. ("Clinton's Ditch" or "Respondent") was a joint employer of truck drivers with

Fairfield Transportation Corp. ("Fairfield") and that Clinton's Ditch had violated Sections 8(a)(1) and (5) of the National Labor Relations Act (the "Act"), 29 U.S.C. §158(a)(1) and (5), by failing to bargain with Teamsters Local 317 (the "Union" or "Petitioner") over Respondent's decision to subcontract its trucking operations. Clinton's Ditch petitioned the United States Court of Appeals for the Second Circuit for review on the basis that sufficient evidence did not support three of the Board's essential findings, viz., (1) Clinton's Ditch was a joint employer, (2) Clinton's Ditch failed to bargain with the Union over a mandatory subject of bargaining; i.e., subcontracting its trucking operations, (3) the Union had made a timely demand upon Respondent to bargain. On December 5, 1985, the Court of Appeals vacated the Board's order based only upon its holding

that there was insufficient evidence on the record to support the Board's determination that Clinton's Ditch was a joint employer of the truck drivers.

The Union, Intervenor below, seeks review of this decision. The Board, Respondent below, takes the position that this case is not appropriate for certiorari.

SUMMARY

The petition for certiorari should be denied. The specific considerations governing a grant of certiorari set forth in Rule 17 are not present in this case, nor are there any "special and important reasons" for this Court to review the decision of the Court of Appeals. Petitioner's claim that the Second Circuit has developed a new standard for determining joint employer status that has contributed to a conflict among the circuits is incorrect. The

Court of Appeals neither developed a new joint employer test nor adopted a standard for determining joint employer status that was in conflict with the decision of another circuit. Instead, after carefully examining the facts of the instant case and the various joint employer standards espoused by the Board and the circuit courts, the Court of Appeals concluded that application of any test to the instant case would result in the determination that Clinton's Ditch was not a joint employer of the drivers. In sum, the Court of Appeals' holding was based solely on its determination that the evidence on the record did not sufficiently support the Board's finding that Clinton's Ditch was a joint employer. Petitioner can posit no compelling reason to warrant this Court's review of the Court of Appeals' decision that the facts

of this case did not support a finding that Clinton's Ditch was a joint employer.

There is nothing to support Petitioner's claim that the Court below misapplied the substantial evidence standard.

Petitioner's claim that the Second Circuit erred in finding a waiver of an alleged oral agreement between Petitioner and Clinton's Ditch is incorrect. The Court below, in agreement with the Administrative Law Judge and the Board, found no oral agreement. Furthermore, the issue of the oral agreement was not properly before the Court below and the portion of Petitioner's brief addressing that subject had been stricken by order of the Court. Therefore, the issue is not properly before this Court.

COUNTERSTATEMENT OF THE FACTS

Clinton's Ditch is engaged in the business of bottling and canning Pepsi Cola and other beverage products at its plant in Cicero, New York. These products are then shipped primarily to other Pepsi Cola bottlers which are members of the Cooperative. Prior to January, 1976, the products were transported by employees of Clinton's Ditch in trucks leased from and maintained by Ryder Truck Rental ("Ryder"). The Clinton's Ditch drivers were represented by Petitioner. [Petitioner's Appendix at A-5, "Pet. App." herein].

On January 1, 1976, Fairfield purchased these trucks from Ryder and entered into a truck leasing agreement and maintenance contract with Clinton's Ditch. In May, 1976, Clinton's Ditch and Fairfield entered into a separate

agreement whereby Fairfield assumed Clinton's Ditch's obligations under its collective bargaining agreement with the Union which ran from February 2, 1976 until February 1, 1978. Clinton's Ditch notified the Union by letter on September 7, 1976 that "effective Monday, September 20, 1976, [Clinton's Ditch] will transfer our trucking over to [Fairfield] along with the collective bargaining agreement . . . . The drivers will be transferred to [Fairfield's] payroll on that date also." By letter dated September 9, Clinton's Ditch asked the Union to acknowledge Fairfield as the new employer of the drivers after the transfer of operations had taken place. In a letter four days later the Union responded by stating that it would refuse to recognize Fairfield as the drivers' employer. [Pet. App. A-6 to 7].

On September 20, the drivers were transferred to Fairfield's payroll. Clinton's Ditch did pay the drivers' vacation pay until the end of 1976 and continued to provide the drivers with a few nominal benefits (a Thanksgiving turkey, an annual clambake, and two cases of soda a week) throughout the period of its contract with Fairfield. Otherwise, Fairfield assumed all responsibility for the terms of the drivers' employment. [Pet. App. A-7].

While the drivers essentially performed the same functions as before, they were now under the supervision and control of the Fairfield dispatcher. Clinton's Ditch would prepare a list of pickups and deliveries and submit it to the Fairfield dispatcher who would assign the runs to the drivers. On occasion, Clinton's Ditch would alter a drivers assignment by directly contacting the

driver at one of his stops, ask drivers to move empty trailers around the Clinton's Ditch yard, or ask them to take runs not listed on the dispatch sheet. The drivers were under standing orders from Fairfield to honor such requests from Clinton's Ditch. [Pet. App. A-8].

Clinton's Ditch informed members of the Cooperative that the drivers were now employed by Fairfield, but that its members should contact Clinton's Ditch if they had any problems with the drivers. Several times, when members complained to Clinton's Ditch about the conduct of the drivers, Clinton's Ditch would forward these complaints to Fairfield. On occasion, these complaints would take the form of a written complaint or would be discussed with Fairfield. Fairfield would investigate the complaint and decide whether to institute disciplinary action. Oftentimes, but not always, Fairfield

would inform Clinton's Ditch of the action it had taken. Clinton's Ditch did not participate in grievance proceedings involving the Fairfield drivers. [Pet. App. A-8].

In late 1977 and early 1978, the Union and Fairfield met to negotiate a new collective bargaining agreement. Clinton's Ditch did not participate in the negotiations. Eventually Fairfield and Petitioner settled upon a new agreement that was to run to February, 1981. Clinton's Ditch was not a party to this agreement. [Pet. App. A-9].

Fairfield informed Clinton's Ditch on July 29, 1980 that it would terminate their truck leasing and maintenance contract on October 31, 1980 unless the parties could reach a new agreement on that date with a rate increase for Fairfield's services. Clinton's Ditch contacted other trucking

companies as possible replacements and in late August received a written proposal from Global Leasing, Inc. ("Global"). In early October Clinton's Ditch requested that Fairfield postpone the termination of the contract for thirty days. This request was refused by Fairfield. [Pet. App. A-9].

Fairfield informed the Union, by letter dated October 16, 1980, that all drivers would be permanently laid off on October 30. Hall, the Union president, approached Respondent's president Woodruff on this subject. Woodruff informed Hall that a thirty-day extension of the contract with Fairfield had been requested and denied, so Hall should speak to Fairfield. [Pet. App. A-9].

Thereafter, Clinton's Ditch informed Global to be ready to supply drivers on November 1. After Clinton's

proposal to replace Fairfield with Global, the two parties signed a contract on October 29, 1980. Fairfield sold its tractors to Ryder and its trailers to Lincoln Leaseway. These companies then leased this equipment to Clinton's Ditch for use by Global drivers. Initially, Global did not hire any of the drivers formerly employed by Fairfield. [Pet. App. A-9 to 10].

On October 30, 1980, the Union sent a telegram to Clinton's Ditch demanding that it bargain with the Union over its decision to retain Global as its trucking company. Thereafter, the Union initiated the present proceeding by filing charges against Clinton's Ditch at the National Labor Relations Board. [Pet. App. A-10 to 11].

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS DID NOT RENDER A DECISION ON THE PROPER STANDARD FOR DETERMINING JOINT EMPLOYER STATUS WHICH CONFLICTS WITH THE DECISION OF ANOTHER CIRCUIT COURT.

The Petitioner argues that the issue presented by this case is an "important issue of federal labor law" which requires Supreme Court intervention. Petitioner also argues that the important issue has not been resolved below because the Court of Appeals has contributed to a conflict among the circuits by developing a new standard for determining joint employer status. Neither claim is accurate. As to the need for this Court to become involved in reviewing the purely factual issue of the joint employer status, it is sufficient to note that the position of the Board, the agency empowered to formulate this area of

federal labor policy, is that this case is not appropriate for certiorari. Furthermore, this Court has recently denied certiorari in two "joint employer" cases under the National Labor Relations Act. Pulitzer Publishing Co. v. N.L.R.B, 618 F.2d 1275 (8th Cir.), cert. denied, 449 U.S. 875 (1980); Industrial Personnel Corp. v. N.L.R.B, 657 F.2d 226 (8th Cir. 1981), cert. denied 454 U.S. 1148 (1982).

In response to the alleged conflict among the circuits, the Court of Appeals rendered its decision only after examining all the joint employer tests put forth by the Board and various circuits and deciding that under any standard the facts of this case did not support the Board's conclusion that Clinton's Ditch was a joint employer of the drivers.

In International House v. N.L.R.B., 676 F.2d 906 (2d Cir. 1982), the Second Circuit recognized that other

circuits had used various tests to determine whether an employer "'possessed sufficient control over the work of the employees to qualify as a joint employer.'" International House, 676 F.2d at 912; Boire v. Greyhound Corp., 376 U.S. 473, 482 (1964). At that time, the Court in International House noted that the Eighth Circuit in Pulitzer Publishing Co. v. N.L.R.B., 618 F.2d 1275, 1279 (8th Cir.), cert denied, 449 U.S. 875 (1980), examined four factors to determine joint employer status: (1) common ownership, (2) common management, (3) interrelation of operations, and (4) centralized control of labor relations. The Ninth Circuit examined the Employers' "authority over employment conditions which are within the area of mandatory collective bargaining." Sun Maid Growers v. N.L.R.B., 618 F.2d 56, 59 (9th Cir. 1980). The D.C. Circuit looked to "the amount of actual and

potential control *** over the *** employees." International Chemical Workers Union Local 483 v. N.L.R.B., 561 F.2d 253, 255 (D.C. Cir. 1977).

Similarly, the Court of Appeals noted other tests that had been developed for determining joint employer status. So, for example, the Court noted that the Fourth Circuit, in N.L.R.B. v. Jewell Smokeless Coal Corp., 435 F.2d 1270, 1271 (4th Cir. 1970)(per curiam), had examined whether the employer "possessed sufficient indicia of control over the work of the employees," while the Third and Fifth Circuits used the same analysis employed by the Board in the instant case; i.e., whether the employer shared or co-determined matters governing the employees' essential terms and conditions of employment. N.L.R.B. v. Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117, 1123

(3rd Cir. 1982); Ref-Chem Company v. N.L.R.B., 418 F.2d 127, 129 (5th Cir. 1969).

After examining the various standards for determining joint employer status, the Court concluded, as it had in International House, that there was "no need to select among these approaches or to devise an alternate test ....", [Pet. App. at A-14 quoting 676 F.2d at 913], because it found "that an essential element under any determination of joint employer status in a subcontracting context is lacking here - sufficient evidence of immediate control over the employees." [Pet. App. at A-14]. Based on its examination of the facts presented in the instant case, the Court of Appeals specifically declined to establish or adhere to a specific test for determining joint employer status. Therefore, the Court of Appeals did not render a decision

in conflict with the decision of another circuit court that would warrant this Court's review under Rule 17.

II.

THE COURT OF APPEALS CORRECTLY DECIDED THAT SUBSTANTIAL EVIDENCE DID NOT SUPPORT THE BOARD'S DECISION THAT CLINTON'S DITCH WAS A JOINT EMPLOYER OF THE DRIVERS.

As this Court found in Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964), the question of whether an employer possesses sufficient control over the employees to qualify as a joint employer "is essentially a factual issue." The Board's determination of that issue will be conclusive only if it is "'supported by substantial evidence on the record considered as a whole'". International House v. N.L.R.B., 676 F.2d 906, 912 (2d Cir. 1982); (29 U.S.C. §160(e)). The Court of Appeals, in examining the essentially

undisputed facts of this case correctly found that they did not support the Board's conclusion that Clinton's Ditch was a joint employer of the drivers.

As stated previously, the Court of Appeals focused on the one essential element common to all joint employer tests, namely, sufficient evidence of immediate control over the employees. The Court employed five factors to determine if the evidence on the record supported a finding that Clinton's Ditch exercised sufficient immediate control over the drivers to warrant a conclusion that it was a joint employer. The five areas of control examined by the Court were: hiring and firing; discipline; pay, insurance and records; supervision; and participation in the collective bargaining process. Examining each of these areas of control separately, the Court found that the record evidence did not indicate that

Clinton's Ditch exercised sufficient control to warrant its being found a joint employer.

The Court noted that the Administrative Law Judge ("ALJ") had found that "it appears that hiring and firing was done by Fairfield." [Pet. App. at A-14, A-61]. In contrast to the ALJ's finding that Respondent "effectively disciplined drivers," [Pet. App. at A-60], the Court noted that there was no evidence that Clinton's Ditch was directly involved in any disciplinary action against the drivers. Indeed, the Court found that the complaints Clinton's Ditch made to Fairfield against the drivers were in the nature of complaints a customer would raise over unsatisfactory performance. [Pet. App. A-15]. Regarding pay, insurance and records, the ALJ determined that it was Fairfield who was responsible for pay and maintaining the drivers'

records. The record contained no evidence that Clinton's Ditch provided insurance for the drivers. Indeed, the Court determined that the isolated benefits Clinton's Ditch did provide to the drivers were so de minimis in nature as to be insignificant in a joint employer analysis. [Pet. App. A-15 to 16]. The alleged instances of supervisory involvement by Clinton's Ditch upon which the ALJ rested his finding were Clinton's Ditch accepting some collect phone calls from the drivers and occasionally assigning some runs. Examining the record as a whole, the Court found that Respondent's limited direct contact with the drivers did not support the day-to-day supervision found by the ALJ. [Pet. App. A-16 to 17].

The Court of Appeals also held that the lack of record evidence indicating Clinton's Ditch involvement in the

collective bargaining process between Fairfield and the Union also warranted a finding that Respondent was not a joint employer. The Court's determination was based on several pertinent facts established by the record. One, Clinton's Ditch neither participated in the 1978 bargaining negotiations between Fairfield and the Union, nor was it a party to the agreement signed between the two parties. Two, the Court determined that the ALJ's finding that Fairfield "continually had to consult with Clinton's Ditch" during the bargaining process was not indicative of Respondent's involvement as an employer, but merely demonstrated that Fairfield was informing a customer of possible rate increases due to increased labor costs. In addition, the Court noted that the record established only that the Fairfield representative had stated to the Union that he had to consult with

Clinton's Ditch before making any bargaining concessions. There was no evidence on the record to indicate whether the representative had actually consulted with Respondent or was merely using this statement as a bargaining ploy with the Union. Three, the Court noted that the NLRB had greatly relied on Clinton's Ditch influence on Fairfield during negotiations to insert a clause in the contract insuring that Fairfield's drivers would not honor a picket line by Respondent's production employees. As the Court aptly noted, however, the clause that was ultimately put into the contract as a result of this alleged pressure on Fairfield recognized "the complete separation of Clinton's Ditch and Fairfield Transportation" in resolving disputes. The resulting clause is hardly a statement upon which to base a conclusion that

Respondent was a joint employer of the drivers. [Pet. App. A-17 to 18].

This Court has long-recognized that a Court of Appeals must assess the totality the record evidence in determining whether "substantial evidence" supports the Board's findings and conclusions. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 487-488 (1951). In Universal Camera, this Court held that a reviewing Court may set aside a Board decision "when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's views." 340 U.S. at 488.

The Court of Appeals in the instant case applied the guidelines enunciated by Universal Camera in determining that substantial evidence did

not support the Board's finding Clinton's Ditch to be a joint employer. There is no compelling reason for this Court to review that determination.

III.

PETITIONER'S ARGUMENT THAT RESPONDENT VIOLATED SECTION 8(d) OF THE ACT BY REFUSING TO GIVE EFFECT TO AN ALLEGED ORAL AGREEMENT BETWEEN THE TWO PARTIES IS NOT PROPERLY BEFORE THIS COURT.

Petitioner argues that the Court of Appeals departed from established precedent and clear statutory language in failing to hold that an alleged oral promise by Clinton's Ditch to rehire Union drivers in the event Fairfield terminated its operations was enforceable under Section 8(d) of the Act. 29 U.S.C. §158(d). That issue is not properly before this Court.

Both the ALJ and the Board held that there had been no contract between

the parties regarding Clinton's Ditch rehiring the drivers in the event Fairfield went out of business, deciding this purely factual issue against the Petitioner. The ALJ stated:

> There was no contract between Clinton's Ditch and Local 317 because there was no meeting of the minds between the parties that Clinton's Ditch would rehire the drivers as their direct employees if Fairfield went out of business. (Pet. App. A-61).

The Board adopted this conclusion. (Pet. App. A-22).

As a successful charging party on the other allegations against Clinton's Ditch, Respondent intervened in the proceedings before the Court of Appeals. See, United Automobile Workers v. Scofield, 382 U.S. 205 (1965). Since Petitioner was an "aggrieved party" to the Board's determination that there was no Section 8(d) violation, however, Respondent was required to petition the Second

Circuit for review of this determination. Petitioner did not do so. Accordingly, the Board's motion to strike that part of Petitioner's brief challenging the Board's finding that Clinton's Ditch did not violate Section 8(d) of the Act was granted by the Court of Appeals prior to oral argument.

Since the question of whether Respondent violated Section 8(d) of the Act was not before the Court of Appeals, that issue cannot be raised before this Court as the basis for a writ of certiorari. See, Ellis v. Dixon, 349 U.S. 458 (1955), rehearing denied, 350 U.S. 855 (1955). Furthermore, the threshold issue presented is a purely factual one of whether an agreement was reached. Both the ALJ and the Board held against Petitioner on this issue. The resolution of this issue, which Petitioner did not

appeal from the Court below, does not merit the granting of certiorari.

CONCLUSION

For the foregoing reasons, the Union's petition for a writ of certiorari should be denied.

Dated: June 22, 1986

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